Office-Supreme Court, U.S.
FILED
MAY 11 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1608

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Almeida-Sanchez v. *United States*, 413 U.S. 266 3

Arkansas v. *Sanders*, 442 U.S. 753 4

Bowen v. *United States*, 422 U.S. 916 3

Brown v. *Florida*, 446 U.S. 902, on remand, 392 So.2d 280, petition for cert. pending, No. 80-1644 (filed Mar. 27, 1981) 1, 2

Bush v. *Florida*, 446 U.S. 902, on remand *sub nom. Busch* v. *State*, 392 So.2d 272 .... 2, 3

Dunaway v. *New York*, 442 U.S. 200 4

Linkletter v. *Walker*, 381 U.S. 618 3

Payton v. *New York*, 445 U.S. 573 ..... 1, 2, 3

Steagald v. *United States*, No. 79-6777 (Apr. 21, 1981) 1, 2

United States v. *Dien*, 609 F. 2d 1038, adhered to on petition for rehearing, 615 F. 2d 10 4

United States v. *Medina-Verdugo*, 637 F. 2d 649 4

United States v. *Peltier*, 422 U.S. 531 3

United States v. *Ross*, No. 79-1624 (D.C. Cir. Mar. 31, 1981) 4

United States v. *Tucker*, 610 F. 2d 1007 3-4

Page

Constitution:

United States Constitution, Fourth Amendment 1, 2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1608

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The question presented in this case is whether the principles announced in *Payton* v. *New York*, 445 U.S. 573 (1980), should be applied retroactively to exclude evidence obtained in the course of warrantless arrest entries that took place prior to the decision in *Payton*.[1] In our petition for certiorari, we noted that the issue of the retroactivity of *Payton* was then under submission in *Steagald* v. *United States*, No. 79-6777 (Apr. 21, 1981), and we suggested that the Court defer consideration of our petition in this case pending its decision in *Steagald*.

Without reaching the *Payton* retroactivity question, the Court in *Steagald* held that, absent exigent circumstances or consent, the Fourth Amendment requires a law enforcement officer to obtain a search warrant before searching for

---

[1]This question is also raised in the petition for a writ of certiorari in *Florida* v. *Brown*, No. 80-1644 (filed Mar. 27, 1981).

the subject of an arrest warrant in the home of a third party. It is our submission that the Court should now grant our petition in this case in order to resolve the retroactivity question that it did not reach in *Steagald*.

Neither the result in *Steagald* nor the fact that the Court did not decide the *Payton* retroactivity issue in that case suggests that *Payton* should be applied retroactively. The substantive Fourth Amendment question presented in *Steagald* was quite different from the question that was before the Court in *Payton*. Thus, as we conceded in our brief in *Steagald* (79-6777 U.S. Br. 12, 26), it is conceivable that even if the Court in *Payton* had not adopted an arrest warrant requirement for entries into a suspect's own house, it would still have required the police to secure search warrants before searching for a suspect in a third party's residence. Accordingly, the Court's holding in *Steagald*, and its silence with respect to the question of *Payton*'s retroactivity, should not be construed as an implicit acceptance of the proposition that the principles announced in *Payton* should be applied retroactively.

Nor is it of any significance with respect to the retroactivity issue that, following the decision in *Payton*, the Court vacated the judgments in a number of cases and remanded those cases to the lower courts for further consideration in light of *Payton*. See, *e.g.*, *Brown* v. *Florida*, 446 U.S. 902, on remand, 392 So.2d 280 (Fla. Dist. Ct. App. 1980), petition for cert. pending, No. 80-1644 (filed Mar. 27, 1981); *Bush* v. *Florida*, 446 U.S. 902, on remand *sub nom. Busch* v. *State*, 392 So.2d 272 (Fla. Dist. Ct. App. 1980). After this Court's remands in *Brown* and *Bush*, the Florida District Court of Appeal held that *Payton* should be given retroactive application. *Brown, supra*, 392 So.2d at 284; *Busch, supra*, 392 So.2d at 274. In the latter case, the Florida court concluded that this Court would not have vacated the judgment and remanded the case for further consideration

in light of *Payton* "if there had been no intention on the part of the Supreme Court that *Payton* be applied to this case, which was not final and was pending in the Supreme Court at the time its opinion in *Payton* was rendered." 392 So.2d at 274. In reaching this conclusion the court relied upon this Court's statement in *Linkletter* v. *Walker*, 381 U.S. 618, 627 (1965), "that a change in law will be given effect while a case is on direct review."

In essence, the Florida court gave to this Court's summary vacation and remand order, which says nothing at all about the subject of *Payton*'s retroactivity, the same effect as would be given to an explicit decision on the merits after briefing of the issue. We cannot agree that such a conclusion is proper. Indeed, the reasoning of the Florida court in *Busch* is directly contrary to *Bowen* v. *United States*, 422 U.S. 916 (1975), where this Court refused to give retroactive effect to its decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), notwithstanding the fact that it previously had vacated the judgment in Bowen's case and remanded for reconsideration in light of *Almeida-Sanchez*. Relying on its decision in *United States* v. *Peltier*, 422 U.S. 531 (1975), which refused to apply *Almeida-Sanchez* retroactively even though Peltier's direct appeal was pending on the date of the decision in *Almeida-Sanchez*, this Court concluded that the reasons that dictated a holding of nonretroactivity in *Peltier* compelled a similar result in *Bowen*. 422 U.S. at 918. Here, too, the fact that respondent's case was pending on direct appeal on the date that *Payton* was decided does not entitle respondent to benefit from Payton if that decision is not otherwise to be applied retroactively.

Although this Court has never held any of its Fourth Amendment decisions to apply retroactively for exclusionary rule purposes to searches or seizures undertaken prior to the date of the decision, the courts of appeals have, with increasing frequency of late, been holding such decisions

fully retroactive. See, *e.g.*, *United States* v. *Tucker*, 610 F. 2d 1007 (2d Cir. 1979) (*Dunaway* v. *New York*, 442 U.S. 200 (1979), retroactive); *United States* v. *Ross*, No. 79-1624 (D.C. Cir. Mar. 31, 1981) (en banc), slip op. 6-9 (*Arkansas* v. *Sanders*, 442 U.S. 753 (1979), retroactive); *United States* v. *Medina-Verdugo*, 637 F. 2d 649, 652 (9th Cir. 1980) (same); *United States* v. *Dien*, 609 F. 2d 1038, 1046 (2d Cir. 1979), adhered to on petition for rehearing, 615 F. 2d 10 (1980) (same). The issue of the retroactivity of any particular Fourth Amendment decision often appears to be of diminishing practical importance by the time it reaches this Court. But because of the growing divergence between the approach of this Court in its retroactivity decisions and the approach of many state and lower federal courts, more is at stake here than just the retroactivity of the ruling on the arrest-entry issue. It is our view that it is time for this Court to address itself again to the retroactivity issue, and we submit that this case affords a suitable occasion to clarify the law in this area.

For the reasons stated in the petition and in this supplemental memorandum, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05